IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1031 of 1988

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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GURUMUKHDAS TOPANDAS - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR NM KAPADIA for Appellant(s) : 1,
MR AJ DESAI, LD.APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 10/04/2007

ORAL JUDGMENT

1. The present appeal has been preferred by the appellant-orig.convict (hereinafter referred to as 'the appellant') under Section 374 read with Section 386 of the Code of Criminal Procedure, 1973, challenging the judgment and order of conviction and sentence dated 03rd

November, 1988 passed by learned Special Judge (Court No.5), Ahmedabad, in Special Criminal Case No.1 of 1988, whereby he has been held guilty for the offence punishable under Section 3 read with Section 7 of the Essential Commodities Act, 1955 (hereinafter referred to as 'the Act').

2. I have heard Shri N.M. Kapadia, learned counsel appearing for the appellant as well as Shri A.J. Desai, learned Additional Public Prosecutor, appearing on behalf of the respondent-State at length. Both of them have taken me through the oral as well as documentary evidence led during the course of trial and also the judgment and order of conviction and sentence under challenge.

3. To appreciate the rival contentions, it would be appropriate for this Court to state the prosecution case in brief. It is the case of the prosecution that the appellant was holding a licence for selling commodities in Sabarmati

area and was running a Fair Price Shop. The appellant was also selling Palmolin oil and was getting the same from the Government godown located near Civil Hospital at Ahmedabad at special rates. That on 21st December 1982 at about 01-00 p.m. the appellant got one barrel of palmolin oil and he took out the barrel of palmolin oil under a gate pass and he was supposed to take the said barrel of palmolin oil to his Fair Price Shop immediately. The entry was also required to be made in the Stock Register and the entire stock was to be sold at the price fixed by the Government to the card-holders. With the help of a labourer/ lariwala, the said barrel of palmolin oil was taken to his shop by the appellant and he had hired one labourer/lariwala on that very day. On that day surprisingly the barrel of palmolin oil had not reached to the shop of appellant. On 22nd December 1982, the shop of appellant was checked by the officers of the Civil Supply Department and the said barrel was not found.

There was no document to show under which it can be inferred that the stock was sold on 21st December 1982 or during early hours on 22nd December 1982, prior to checking. On the contrary, it was found that the barrel of palmolin oil did not reach to the shop of appellant but he had directly disposed of the stock of palmolin oil purchased by him from the Government godown. It is further the case of the prosecution that two gunny bags of sugar though were found lying in the shop were not entered in the Stock Register and the appellant had also failed in displaying the price list of each material which was being sold from his shop. Initially the shop at the time of visit was closed. Thereafter, the appellant was called and he had admitted that the barrel of palmolin oil purchased from the Government godown had not reached. Again checking of the shop was made after some hours by that time the officers had visited the Government godown and also met the person who was hired to carry the barrel of palmolin oil.

On the second visit also, the authorities found that the barrel of palmolin oil had not reached to the shop of appellant. The statements of the appellant were recorded on both the visits on 22nd December 1982 and the appellant had signed the same in presence of concerned officers. Thereafter, Civil Supply Department had initiated action, and ultimately, the Collector decided to confiscate the stock as well as amount of deposit paid by the appellant to the Government for obtaining licence as Fair Price Shop Dealer. The Departmental proceedings lingered for long, but ultimately the Collector found that this is a grave case and, therefore, he ordered and authorized an officer-complainant to file a formal criminal complaint with police along with all relevant papers. The Police practically has not made any detailed investigation but on the strength of the documents tendered by the complainant including the statements of the appellant recorded by the revenue authorities during

proceedings of the Civil Supply Department and the panchas, the Police submitted report on 11th January 1988, under Section 173 of the Code of Criminal Procedure, 1973. The complaint was filed on 01st July 1986 and the appellant was arrested on 20th July, 1986. The appellant faced the charge and ultimately at the end of the trial found guilty for violating Clauses 16 and 23 of the Gujarat Essential Commodities (Licensing and Stock Declaration) Order (hereinafter referred to as 'the Order') and also breach of Clauses 4 and 11 of the Licence issued to the appellant as a Fair Price Shop Dealer. As the Order and the conditions of licence are orders and directions issued under Section 3 of the Act, the appellant has been held guilty of the charge punishable under Section 7 of the Act.

4. I have carefully gone through the judgment and order of conviction and sentence under challenge. The judgment and order of conviction and sentence is assailed on various

grounds as mentioned in the memo of appeal and while developing the arguments, Shri N.M. Kapadia, learned counsel appearing for the appellant, has divided his arguments in two folds. Under the first fold, he has attempted to carve out a defence that the evidence is inadequate to link the appellant with the crime and the learned trial Judge has grossly erred in holding the appellant guilty. Considering this defence, the appellant ought to have been given at least benefit of doubt. The second fold of argument is that the alleged wrong was traced in the month of December, 1982. The appellant had faced the departmental proceedings for a long period and the Department had imposed penalty against the appellant. So there was no need to file a criminal complaint after a lapse of about 4 years in the year 1986. The Police chargesheeted the appellant in the year 1988. So after a lapse of about 6 years when the prosecution was instituted, the learned trial Judge in the year 1988 ought to have given at

least advantage of either Section 360 read with 361 of the Code of Criminal Procedure, 1973 or under Section 4 of the Probation of Offenders' Act. Shri Kapadia has argued on this point at length. He has placed reliance on various decisions of this Court as well as the Apex Court and submitted that merely because the legislature has provided the minimum punishment of three months, it is not always necessary that the appellant should be sent to jail and he can be given advantage of either Section 360 of the Code of Criminal Procedure, 1973 or Section 4 of the Probation of Offenders' Act.

5. When submissions were being made by Shri N.M. Kapadia, learned counsel appearing for the appellant, challenging the legality and validity of the judgment and order of conviction and sentence under challenge, the Court raised certain queries on the strength of the evidence led by the prosecution. The queries raised by the Court were in reference

to :

(i) Admissions made by the appellant in the statements recorded by the learned trial Judge during his examination under Section 313 of the Code of Criminal Procedure, 1973.

(ii) Admissions made by the appellant in the statements Exs.24 and 32 produced by the prosecution and the fact that Ex.32 has been received in evidence on account of admission made by the defence counsel.

(iii) Document Ex.25 and other documents produced as muddamal which do not show the entry of receipt of barrel of palmolin oil and the bill book does not reflect the sale of palmolin oil on or after 21st December 1982.

(iv) The inconsistent stand taken by the appellant whereby he has tried to raise a lame defence of late receipt of the barrel of palmolin oil on 22nd December

1982.

6. While answering the aforesaid queries and referring to the evidence led by the prosecution proving the purchase of barrel of palmolin oil on 21st December 1982 and its non-existence on the date of checking i.e. on 22nd December 1982, Shri N.M. Kapadia has fairly accepted that the appellant may not press the appeal against the judgment and order of conviction. The appellant who is present in the Court today, has instructed Shri N.M. Kapadia and on instructions Shri N.M.Kapadia has submitted that the Court may not record detailed reasons as the appeal against the judgment and order of conviction is not pressed keeping his second fold of argument i.e. point of quantum of punishment, open.

7. Shri A.J. Desai, learned Additional Public Prosecutor, has submitted that the conviction recorded is valid and as the appeal is not pressed against the judgment and order of

conviction, he is not inclined to place any argument on the first aspect of conviction.

8. While advancing his argument on the point of quantum of punishment, Shri N.M.Kapadia has concentrated his arguments on the point that the appellant was entitled to benefit under Section 4 of the Probation of Offenders' Act or Section 360 read with Section 361 of the Code of Criminal Procedure, 1973. Plain reading of the judgment and order under challenge does not reveal that such an attempt was ever made. For giving benefit of Section 4 of the Probation of Offenders' Act, in all cases report of Probation Officer is not required, if the Court is convinced that the discretion is required to be exercised in favour of the accused. Even this Court today can and should give benefit of Section 4 of the Probation of Offenders' Act to the appellant and he may not be asked to go to prison after a lapse of about 25 years from the date of incident. The incident is of the

year 1982; the prosecution is of the year 1986; the chargesheet is of the year 1988; and the appeal remained pending since 1988 till date i.e. for more than 18 years. Earlier orders passed by this Court reveal that the appellant is the father of six daughters and his youngest daughter was getting married when this Court had insisted for final disposal of the appeal. Today Shri N.M. Kapadia, learned counsel appearing for the appellant, has submitted one affidavit sworn by the appellant along with three original photographs of the shop of the appellant. According to Shri Kapadia, the appellant was running a small shop practically in an economically backward area known as Keshavnagar. The residents of the area are either poor or persons of lower middle class. Therefore, the learned trial Judge ought to have given benefit and it is not necessary in all cases that the appellant should be sent to jail merely because minimum punishment is prescribed for a particular offence or under a special statute.

9. Shri A.J. Desai, learned Additional Public Prosecutor, while replying the submissions made by Shri Kapadia, has submitted that in one case the Apex Court had confirmed the punishment of amount of fine imposed while giving benefit under Section 360 read with Section 361 of the Code of Criminal Procedure, 1973 to the accused-convict holding him guilty of the charge punishable under Section 7 of the Act. Ultimately, the present appellant was found responsible for siphoning off the palmolin oil meant for poor people so that Court should confirm the amount of fine and the amount of fine also should be enhanced. If the substantive sentence is reduced or the appellant is given benefit of Section 4 of the Probation of Offenders' Act, the amount fine may be enhanced, otherwise the order of Court would take a wrong message to the Society and the persons dealing in unfair or corrupt practice. Shri N.M.Kapadia, learned counsel appearing for the appellant, has fairly

submitted that in the case of ***Rajeshkumar Jaychandbhai Shah v. State of Gujarat and another (Criminal Appeal No.75 of 1996) decided on 14th March, 2007, by this Court (Coram : C.K. Buch, J),*** this Court has enhanced the amount of fine to Rs.6,000/- and the appellant was directed to pay the remaining amount of fine of Rs.5,000/-. In the present case, the appellant is ready to pay any amount of fine that may be imposed/ enhanced by this Court. The learned trial Judge in the present case has imposed fine of Rs.100/- only. The appellant is ready to pay even higher amount of fine if he is given benefit either under Section 360 of the Code of Criminal Procedure, 1973 or Section 4 of the Probation of Offenders' Act. Shri Kapadia has drawn attention of the Court to the ratio of the decision in the case of ***Ghanshyam Das v. Municipal Corporation of Delhi, reported in AIR 1975 SC 845***. It is submitted that the similar question had cropped up when this Court was dealing with the case of ***(The) State***

of Gujarat v. Ganpatbhai Premjibhai Joshi, reported in 1998(2) GLH 787, and while answering similar question and dealing with grievance raised by the State, the Court has observed that :

> *"4. In the decision reported in AIR 1975 SC 845, almost similar situation was dealt with by Their Lordship and it was a case under the Prevention of Food Adulteration Act and the benefit was decided to be given.*
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> *5. Here also, it may be seen that 1958 Enactment whereby the formal expression of the legislative will to grant benefit of probation was clarified and expressed and in no uncertain terms, for the Enactments which were already on the Statute Book, necessary, reference has been made in Section 18 to exclude them. Essential Commodities Act, 1958 is not one of the Statues referred Commodities Act was very much in force at the time when*

said Probation of Offenders Act, 1958 came to be enacted, the Parliament, in its wisdom, has chosen not to exclude it.

6. Under the circumstances, even the provision for minimum punishment will not come in the way because benefit of probation has to be given to the offenders under the provisions of Indian Penal Code as well as under the provisions of all other Statutes providing for penal offences unless they are specifically excluded either in the Statute itself or under the provisions of the said Probation of Offenders Act. This being not the position in relation to the offences under Essential Commodities Act, obviously, the decision taken by the Ld. Spl. Judge cannot be said to be, in any manner, wrong."

10. In the cited case, the Court was dealing with the legality and validity of the order of the

learned Special Judge, who had granted the benefit of the Probation of Offenders Act to the appellant-accused found guilty of the charge of the offence punishable under the provisions of the Act.

11. Shri Kapadia, learned counsel appearing for the appellant, in support of his argument has also placed reliance on one judgment in the case of ***Harivallabha and another v. State of Madhya Pradesh, reported in (2005) 10 S.C.C. 330***. He has submitted that in this cited decision the accused was given benefit of Section 360 read with Section 361 of Criminal Procedure Code instead of serving substantive sentence. It would be appropriate for this Court to reproduce the relevant paragraphs of this judgment as under :

> *"3. Learned Counsel appearing on behalf of the appellants submitted that the appellants are first offenders and in the facts and circumstances of the case they should have been dealt with under the provisions of Section 360 of the Code of*

Criminal Procedure, 1973 (for short "the Code") and the High Court reduced the sentence of imprisonment from three years to three months without recording any reasons, as required under Section 361 of the Code, which lays down that for special reasons to be recorded, a court can refuse to release a person on probation of good conduct under Section 360 of the Code. In our view, in the facts and circumstances of the present case, the appellants should have been dealt with under the provisions of Section 360 of the Code.

4. Accordingly, the appeal is allowed in part and while upholding the conviction and sentence of fine awarded to the appellants, sentence of imprisonment awarded against them is set aside and the trial Court is directed to deal with them under the provisions of Section 360 of the Code. The appellants, who are on bail, are discharged from the liability of bail bonds."

12. It is rightly argued that in a given case the Apex Court has awarded punishment even less

than minimum prescribed under a special statute. The Apex Court in the case of ***Gurmukh Singh etc. Vs. the State of Punjab, reported in A.I.R. 1972 SC 824***, wherein the Apex Court has decided to modify the sentence. The Court was dealing with a case of selling food articles without licence under Prevention of Food Adulteration Act. The allegation against the accused was that he was found selling articles of food without licence. Along with other aspects the Apex Court considered the point of minimum punishment prescribed in paragraph No.9 of the judgment and it would be useful to reproduce the relevant part of paragraph No.9 of the judgment, which is as under :

> *"9. On the question of the sentence, it is not denied that the offence with which each of the appellants was charged was committed after the amendment of sub-s. (1) of S.16 of the Act under which the sentence has to be a minimum of six*

months' rigorous imprisonment and a fine of Rs.1000/-, unless it is covered by the proviso to that sub-section in which case a lesser sentence can be given for adequate and special reasons to be mentioned in the judgment. .....

It is not the case of the prosecution that the appellants sold or stored any adulterated or misbranded or prohibited articles of food. Even in such cases if the offence is with respect to an article of food which is adulterated under sub-cl. (1) of cl. (i) of sec. 2 or misbranded under sub-cl. (ix) of sec. 2 a lesser sentence under the proviso can be awarded. As pointed out in Jagdish Prasad v. State of West Bengal, Cri. App. No. 50 of 1969 D/-13-12-1971 (SC) the offences under the Act being anti-social crimes affecting the health and well being of our people, the Legislature having regard to the trend of courts to impose in most cases only fines or where a sentence of imprisonment was passed a

light sentence was awarded even in cases where a severe sentence was called for, a more drastic step was taken by it in prescribing a minimum sentence and a minimum fine to be imposed even for a first offence. The reason for the Legislature to make the exception is not that the offences specified are not considered to be serious but the gravity of the offence having regard to its nature can be less if there are any special or adequate reasons. In our view, though offences for adulteration of food must be severaly dealt with, no doubt depending on the facts of each case which cannot be considered as precedents in other cases, in this case having regard to the fact that the offence is only one for non-renewal of a licence within a reasonable time, and the appellants as pointed out by the trying Magistrate were only petty traders a mitigation in the sentence is justified. No doubt, as the High Court point out, the reason given by the Trial Court that the

accused pleaded guilty and were repentant may not be adequate. But in the special circumstances pointed out by us a lesser sentence is called for. In view of the fact that all the appellants have already served one week's sentence, we think interests of justice would be served if the sentence of six months imprisonment and fine of Rs.1000/- is reduced to a period of imprisonment already undergone by each of them, and to pay a fine of Rs.250/- and in default of which they are directed to undergo a further period of imprisonment for one month. In each of these appeals this sentence is substituted for the sentence awarded by the High Court and the appeals are accordingly allowed to this extent."

12.1 The observation of the above cited decision made by the Apex Court clearly goes to indicate that while dealing with the sentence imposed upon the accused, the Court should consider the category of case. The Court is aware that protraction of trial or delay in

hearing of criminal appeal normally would not come in the way of imposition of sentence and that by condition, would not be sufficient to reduce the quantum of punishment imposed. But considering the circumstances that may be pointed out to the Court, the lesser punishment can be imposed by the Court. Ultimately, the imposition of punishment, period of punishment and substantive sentence should be able to carry the proper message to the society. But in each case the Court should not be enthusiastic to see that each order of punishment should deter the members of the society.

13. The Apex Court in the case of ***Umrao Singh vs. State of Haryana, reported in AIR 1981 SC 1723***, has found that this is a fit case to award sentence lower than the minimum prescribed. In paragraph No.2, the Apex Court has observed as under :

> *"2. Having regard to these facts, the expression of and the view of the High Court was justified. We accordingly*

reduce the sentence of the appellant to the period already undergone. The sentence, of fine is maintained and we are informed that he has already paid the fine. Since he is already on bail, he should be released forthwith."

13.1 It is true that the plain reading of the judgment, does not give detail that for how much period the appellant-accused had remained in jail but when the Court is of the view that the substantive sentence requires to be reduced, then only the Court has to look into the period already undergone.

14. So, the Court can decide to exercise powers vested with the Court under the provisions of Section 360 of the Code of Criminal Procedure because otherwise also the substantive sentence could have been reduced to any minimum period by assigning detailed convincing reasons. When the Court otherwise is competent to reduce punishment than the minimum prescribed, then whether this is a case where the Court should act in a

reformative manner and exercise powers vested with the Court under the provisions of Section 360 of the Code of Criminal Procedure, is the question.

15. Considering the above submissions and certain observations made by this Court in the case of ***State of Gujarat v. Natwar Harchandji Thakor, reported in 2005(1) GLR 709 (Re.paragraph nos.18, 19, 21, 47, 48 and 49),*** this Court can apply thoughts of a reformatory school instead of sending the appellant in jail, especially when Shri Kapadia has fairly accepted that the appellant is ready to pay any amount of fine imposed/enhanced by this Court because there is no serious dispute on two aspects which according to me are very relevant **(i)** the appellant was holding licence to run Fair Price Shop since 1973 and there is nothing in evidence to show that any case whatsoever of any irregularity was registered against the appellant and he has stated these facts on oath in the affidavit; and **(ii)** even after 22nd December 1982 till the year 1986,

the very Civil Supply authorities had permitted the appellant to continue with the business and his licence was renewed from time to time and it was cancelled in the year 1986. During the period between 1982 and 1986 i.e. after incident also, no irregularities were reported or found against the appellant. It is the say of the appellant that no case was registered against him and he was quietly facing the proceedings initiated by the Department and the Collectorate. The Court cannot ignore that the authority could have filed FIR immediately after some discreet inquiry and the investigation ought to have been left to the Police. But after conclusion of all the departmental proceedings and that too, after a lapse of about 4 years, a formal complaint came to be filed. The delay in filing the FIR or complaint would not be a strong defence in such or similar cases and therefore only, the learned trial Judge has not given any advantage to the appellant but the learned trial Judge ought to have thought

whether the appellant should be given any benefit of either Section 360 of the Code of Criminal Procedure, 1973 or Section 4 of the Probation of Offenders' Act or not. Of course, on that day, the judgment of the Gujarat High Court in the case of Ganpatbhai P. Joshi (supra) was not there, but three decisions referred to hereinabove of the years 1972, 1975 and 1981, all of the Apex Court were there.

13. Now the crucial question before the Court is as to what amount of fine should be imposed/ enhanced. According to me, to send a message of deterrence if the amount of fine is enhanced to Rs.25,000/-, it would serve the purpose. The amount of Rs.100/- has already been paid by the appellant. The remaining amount of Rs.24,900/- now can be paid by the appellant as an amount of fine, otherwise the same can be recovered from the appellant or he can also be asked to undergo the indefault imprisonment prescribed by the learned trial

Judge. Shri N.M. Kapadia, learned counsel appearing for the appellant, has submitted that if the amount of fine is more than Rs.20,000/- then at least 15 days' time should be given to the appellant so that he can arrange for the amount of fine or the Court should grant instalments. This submission being fair and reasonable can be accepted.

14. In view of aforesaid observations and discussion, the present appeal is hereby partly allowed. The judgment and order of conviction dated 03rd November, 1988, passed by the learned Special Judge (Court No.5), Ahmedabad, in Special Criminal Case No.1 of 1988, is confirmed. The sentence of fine is enhanced to Rs.25,000/- and the appellant-orig.convict shall now pay the remaining amount of Rs.24,900/- within a period of 30 days from the date of receipt of the writ, failing which the learned trial Court shall issue a non-bailable warrant for arrest against the appellant-orig.convict to serve the sentence imposed by the learned trial

Court. However, the order of substantive sentence imposed by the learned trial Court is altered and the same is placed under suspension.

The appellant-orig.convict is directed to execute a bond of Rs.5,000/- (Rupees Five Thousand only) under Section 4 of the Probation of Offenders' Act read with Section 361 of the Code of Criminal Procedure, 1973, with one surety of the like amount for a period of two years, while paying the enhanced amount of fine; failing which also, the learned trial Court shall issue a non-bailable warrant of arrest against the appellant-orig.convict to serve the sentence imposed by the learned trial Court. The order of substantive sentence imposed shall remain under suspension till the period of bond i.e. for two years, and it shall become inoperative on completion of such period of two years. If there is breach of any of the conditions of bond to be executed under Section 4 of the Probation of Offenders' Act read with Section 361 of the Code of Criminal Procedure, 1973, by the appellant-orig.convict, the learned

trial Court shall be at liberty to issue a non-bailable warrant of arrest against the appellant-orig.convict for serving the sentence imposed by the learned trial Court.

The bail bond executed by the appellant-orig. Convict pending appeal shall stand discharged on the date on which the appellant-orig.convict executes the bond under Section 4 of the Probation of Offenders' Act read with Section 361 of the Code of Criminal Procedure, 1973, before the learned trial Court.

Order and direction accordingly.

(C.K. Buch, J)

Aakar